

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
WILLIAM T. AND JOY P. ORR)

Appearances:

For Appellants: Charles R. Perelman
Attorney at Law

Norton N. Brown
Certified Public Accountant

For Respondent: Peter S. Pierson
Tax Counsel

O P I N I O N

This appeal is made pursuant to section 19059 of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of William T. and Joy P. Orr for refund of penalty in the amount of \$3,677.52 for the year 1961.

Pursuant to a timely request, appellants were granted an extension of time until July 15, 1962, for filing their 1961 income tax return,, On that date respondent Franchise Tax Board received a return, without remittance,, purporting to be the Orrs' but signed for them by their business manager, Sheldon Graff. Appellants were not aware of this return. They state that Mr. Graff had continuously informed them that unresolved business matters had prevented a return from being filed but that appropriate extensions of time had been obtained,, In October of 1962 Mr. Orr became concerned about Mr. Graff's management of appellants' affairs and engaged an independent accounting firm to make an audit, Mr. Orr also advised respondent that he had not signed an income tax return for 1961,

The audit disclosed that appellants' business manager had misappropriated almost \$1 million of appellants' funds. Mr. Graff eventually was convicted for fraud and embezzlement, and various civil suits arose involving the legal ownership of the property. Many of these litigants used appellants' business records for preparation of their cases.

On October 16, 1963, the Orrs filed a 1961 return and paid a tax of \$11,685.31. Respondent issued a proposed assessment of additional income tax and assessed a 25 percent penalty of \$3,677.52 for delinquent filing. The appellants paid these additional amounts but filed a claim for refund with respect to the delinquency penalty. Respondent has denied this claim. The instant issue is whether this denial was correct.

Section 18681 of the Revenue and Taxation Code provides for a graduated penalty, with a maximum of 25 percent, for the late filing of personal income tax returns. The taxpayer can avoid this penalty if he can show that the delay was due to reasonable cause and not due to wilful neglect. This statute is substantially the same as section 6651(a) of the federal Internal Revenue Code.

A return purporting to be appellants' but signed by their business manager was filed on July 15, 1962. Regulation 18401-18404(e), title 18, California Administrative Code, states that a return may be made by an agent only if illness or absence from the United States prevents the taxpayer himself from making the return. Neither of these situations was present here and consequently the July 15, 1962, return cannot be considered valid. Therefore, no basis exists for holding that the return filed on October 16, 1963, was an amended return.

It is appellants' contention that reasonable cause can be established for the fifteen-month delay in filing their 1961 return. Appellants first argue that during the period of July 15, 1962, to October, 1962, Mr. Graff had, continuously misrepresented to them that respondent had granted extensions. However, these misrepresentations do not establish reasonable cause,, (Pioneer Automobile Service Co., 36 B.T.A. 213.) It is the duty of ~~the~~ taxpayer to see that a timely return is filed, and the delegation of this responsibility will not serve to excuse late filing. (Malcolm Clifton Davenport, 6 T.C. 62,)

It is next contended by appellants that once Mr. Graff's mismanagement was discovered, the complexity and confusion of the business records, and the use of these records by various litigants, including appellants themselves, made impossible the filing of their 1961 return

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until October 16, 1963. However, appellants have not carried their burden of showing that these contingencies justify a delay of one full year. Appellants have not demonstrated that the condition of their records was such that it was impossible to obtain the information necessary for an income tax return to be filed, (The Nirosta Corp., 8 T.C. 987.) Nor have they shown that government agencies impounded their records and denied appellants access, (James J. Donohue, T.C. Memo., June 27, 1966.) Also, it is understandable that the Orrs were very concerned about the timely filing and successful pursuance of the litigation necessary to successfully recoup their misappropriated funds. The filing of timely tax returns, however, was equally as important, (Calvert Iron Works, Inc., 26 T.C. 770, 782.) If appellants chose to sacrifice the timeliness of one aspect of their business affairs in order to more competently pursue other endeavors, they must bear the consequences.

We conclude that appellants have not shown that the fifteen-month delay of their 1961 personal income tax return was due to reasonable cause and not due to wilful neglect.

O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of William T. and Joy P. Orr for refund of penalty in the amount of \$3,677.52 for the year 1961, be and the same is hereby sustained.

Done at Sacramento, California, this 5th day of February, 1968, by the State Board of Equalization.

Paul R. Leake, Chairman
Paul R. Leake, Member
John W. Lynch, Member
John W. Lynch, Member
John W. Lynch, Member

ATTEST: John W. Lynch, Secretary